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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-728

MARK ROSENSTOCK,

Petitioner,

v.

DALE ROSENSTOCK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

MARK ROSENSTOCK,

Petitioner,

v.

DALE ROSENSTOCK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

To the Honorable, the Chief Justice and the Justices of the Supreme Court of the United States.

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California dated August 20, 1975 denying hearing.

Opinion below and Proceedings in the Court below

This is an appeal from the order of the Supreme Court, State of California dated August 20, 1975 denying petitioner's hearing with respect to the opinion of the Court

of Appeals of the State of California dated the 27th day of June, 1975 which had affirmed the judgment of the Superior Court of Los Angeles County dated October 3, 1973 and entered on October 15, 1973 which:

1. declared a stipulation and agreement entered into by the parties hereto and dated April 16, 1973 void, illegal and unforceable;
2. determined that an *ex parte* California judgment of divorce granted on March 12, 1970 in favor of respondent was valid and personally binding on the petitioner; and
3. awarded respondent:
   (a) the sum of $100,000.00 as attorney's fees in connection with the enforcement of the California judgment;
   (b) the sum of $35,000.00 purportedly representing the alleged costs of accountants and for travel expenses;
   (c) the sum of $20,000.00 representing respondent's purported damages for intentional infliction of emotional distress;
   (d) the sum of $10,000.00 as alleged punitive damages; and
   (e) the sum of $5,000.00 as damages representing the petitioner's alleged conversion of respondent's property.

Petitioner's motion for a new trial was denied on October 25, 1973.

The decision of the Superior Court and the Court of Appeals, Second Appellate District and Division I of the Supreme Court of the State of California are set forth in the appendix annexed hereto.

Jurisdiction

Petitoner's petition for hearing was denied by the Supreme Court of the State of California on August 20th, 1975. The jurisdiction of this Court is invoked under Article IV, Section 1, of the Full Faith and Credit Clause of the Constitution of the United States; Amendments V, and XIV, Section 1, of the Constitution of the United States.

Questions Presented

1. Did the California State Court properly refuse Full Faith and Credit to the *prior* New York State Judgment of Divorce?

2. Did the California State Court deny petitioner both substantive and procedural due process of law violative of the Constitution of the United States in refusing to give Full Faith and Credit to a prior *in personam* New York judgment of divorce wherein (a) the *ex parte* California judgment of divorce granted respondent and entered March 12, 1970, postdating petitioner's New York judgment of divorce, was jurisditionally void *ab initio*, by reason of the lack of proper service of process over the person of the petitioner; (b) the lack of personal jurisdiction of the petitioner; and (c) respondent's failure to comply with the then, *mandatory* one (1) years jurisdictional requirements in the State of California prior to the filing of her *complaint for divorce?*

3. Did the California State Court deny petitioner both substantive and procedural due process of law violative of the Constitution of the United States in refusing to follow the applicable law of New York State regarding the effect and validity of the stipulation-agreement dated April 16th, 1970; in depriving petitioner of a fair, impar-

tial and unbiased trial with the right to fully litigate the jurisdictional issues and to introduce evidence unimpaired?

Statutes Involved

Article IV, Section 1, United States Constitution:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Article V, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Article XIV, Section 1, United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 211, New York Domestic Relations Law;

"211. Pleadings, proof and motions.—A matrimonial action, except an action to declare the nullity of a void marriage, an action to annul a marriage on the ground of incurable insanity and a proceeding to dissolve a marriage on the ground of absence, *shall be commenced by the service of a summons only and a verified complaint in such action may not be served until the expiration of one hundred twenty days from the date of the filing of a notice of commencement of the action . . .*" (emphasis added) (now repealed)

CALIFORNIA CIVIL CODE

§4530. *State and County Residence Time—Legal Separatiion Exception.*

(a) A judgment decreeing the dissolution of a marraige may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceedings is filed for three months next preceding the filing of the petition.

• • •

Leg.H. 1969 ch. 1608, *operative Jan. 1970.*

Predecessor to Civil Code, Section 128 requiring domicile for at least one (1) year "next preceding the commencement of the action".

Statement of the Case

As is sadly commonplace in matrimonial disputes, the record below reflects a substantial rancor and vituperation between the parties. Petitioner herein does not ask the Court to reweigh the evidence. Rather the effort herein will be to rely on substantially undisputed facts and propositions of law which demonstrate reversible error committed below.

The parties hereto intermarried on March 4, 1962 and have two children of their marriage, aged respectively 13 and 11, both of whom were born in the State of New York. *Specifically, as conceded by respondent, at the very least up until June, 1966 both parties hereto were domiciliaries and residents of the State of New York. In fact, both parties were domiciliaries of the State of New York at the time petitioner herein instituted his action for divorce in New York.*

In November, 1968 the parties hereto, and primarily the respondent herself, started looking for a new home in Westchester County, State of New York, and to this end executed financial papers relative to the purchase of the parties home located in Scarsdale, New York. In addition, respondent joined in the execution of the mortgage commitment, some $52,000.00 in New York State and a New York State Bridge loan of $35,000.00.

Admittedly petitioner is and has always been a domiciliary of the State of New York since his birth there; has continued to permanently reside in that State and has always intended that State to be his domicile. Defendant's businesses, with the exception of a brief period of time during which he owned a business in the State of New Jersey, have always been in the State of New York. At no time whatever did petitioner conduct or transact any business in the State of California; earn any money

in California; ever vote in California; pay any real or personal property taxes in California; owned any real property in California; in fact ever have any assets or business in California, and at no time did he ever intend or in fact change his domicile from the State of New York to California. Consistent with the parties' New York domicile, petitioner's sole source of income was earned and located in New York with respondent conceding that all of petitioner's business interests were located in New York with none in California with petitioner having *New York drivers licenses which confirmed his New York residence as did their execution and filing of joint Federal, New York State and New York City income tax returns, all of which specifically specified and confirmed the State of New York as their domicile and residence through 1968.* Both parties, moreover, were registered to vote in the State of New York and each in fact voted in New York State during the marriage.

Admittedly the parties lived together in Scarsdale, New York from February 10, 1969, through May 26, 1969, at which latter time respondent intentionally abandoned her then husband, and the children resided with them, were enrolled in school in New York and as appropriately admitted by respondent herself:

> "after February 9th of 1969 we stayed at home there"

in Scarsdale, New York. (Pages 1061, 1063, Trial Testimony).

Of parenthetic importance herein, while "freely . . . confessing" that it does not:

> "know anything about marital law"

the Trial Court itself noted below that:

> "When I examine these judgments, I have got to look to see what court, if either, had jurisdiction of this dispute. I show my ignorance of the matter. *I was surprised to learn two states can have jurisdiction.* No matter which one has jurisdiction, the power of *that court is going to depend upon its particular jurisdiction over the party seeking remedy and the one against whom remedy is sought, and that is going to depend in large part on residence.*
>
> *Now, I have had a flood of indicia of residence from the defendant, the voting, the tax payment, and all that business,* and it might—*it will certainly, bear on the residence up to May 25 1969.* Max has promised me days and days of indicia to the contrary. When I get through hearing all that, *I am going to decide what the residence was on the day that the lady packed up and took off for California, May 25, 1969.*" (emphasis added; and appearing at page 568 of the record below)

• • •

that court, moreover, later conceding that the agencies supporting petitioner are "a pretty far distance from here".

At the time of respondent's intentional abandonment of her husband, he was in deep financial trouble, was pressured by huge financial debts and was on the brink of financial disaster. At the trial, moreover, respondent admitted that subsequent to her abandonment she had intentionally and wrongfully deprived petitioner of any and all visitation with his infant children, after all, she testified she "had no reason to consider" her husband's "feelings". *At the time of respondent's abandonment and*

her subsequent deprival of her husband's visitation and contact with his infant children, there was no court order awarding her custody of the parties two infant children.

A. Initial Litigation

"In July, 1969 defendant filed an action for divorce in the State of New York"* at which time it was conceded that the respondent herein was personally served with a copy of the summons and complaint in that action. Subsequent to the New York Action, on December 11, 1969, less than *6 months* after respondent's abandonment of her husband and *prior to respondent first being able to satisfy the California mandatory and jurisdictional one (1) year residence requirement then in effect in California, respondent filed her California action for 'divorce'*". At the time of the commencement of respondent's action, she was not and had not been a resident domiciliary of the State of California for at least one year as mandated by Civil Code Section 128, now 4530, 4531 of the California Statutes, the then prevailing statute authority, and no amendment to modify or correct the same was ever made or requested by respondent. It was conceded below, moreover that:

> ". . . the wife filed her action for divorce under the law that existed prior to January 1, 1970 in California. . ."

At no time was respondent served with process within the State of California and subsequent to the filing of the divorce action in California the respondent's sole method of effectuating service upon the petitioner herein consisted

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* A chronological summary is set forth in the appendix filed herewith.

of personal service upon him of the *complaint* in the California action in the State of New York. At no time was respondent served with the summons in the California action for divorce in the State of New York or elsewheres.

On February 17, 1970 petitioner was awarded a judgment of divorce in his favor as against the respondent by the State of New York predicated upon respondent's cruel and inhuman treatment, an action wherein respondent admittedly was personally served with process, subsequently notified of said judgment and the prior pending trial therein, and of paramount importance, *said New York judgment of divorce specifically found and determined that both parties were residents and domiciles of the State of New York.*

Six month subsequent to commencement of the New York divorce action, and subsequent to the entry of the New York Judgment, *on March 12, 1970*, an interlocutory judgment of divorce was granted respondent in California *on default*, although said Judgment was entered *nunc pro tunc* as of February 27, 1970.

Deprived of all visitation and contact with his children between May 26, 1969 and March 3, 1970, and by virtue of the State of New York being the domicile of the parties and their children, petitioner herein obtained physical custody of his son, Robert, on March 3, 1970, and on March 4, 1970 was awarded temporary custody of said child by the Supreme Court, State of New York, County of Westchester, *pending* full hearing as to the issue of permanent custody which hearing was set down for March 23, 1970. *Prior thereto there was no custody award in existence of any kind whatsoever either in the State of California, in the State of New York, or any other jurisdiction.* At that time, moreover, the parties were no longer husband and wife, petitioner theretofore having obtained a divorce against the respondent.

Respondent first consulted New York counsel in late December, 1969 at which time said counsel, testifying at the trial in the Superior Court below, noted:

> "It appeared to me, however, that Mr. Rosenstock was a resident of New York"

and thereafter in March of 1970 received a copy of petitioner's application for custody, was aware of the pending custody proceedings as was respondent's California counsel at that time.

Between March 5, 1970, and April 16, 1970, negotiations ensued between the parties and their respective attorneys relative solely to determining the proper forum for anticipated litigation relative to the different judgments of divorce obtained by each party. Prior thereto, and during the period from March 4, 1970, until the date of the execution of said stipulation and agreement on April 16, 1970, respondent was at all times represented by THREE sets of attorneys, one from California and two separate New York law firms. At least five proposed stipulations and agreements were prepared, with the first stipulation drawn and prepared by respondent's California counsel, the second by petitioner's attorney and *the April 15, 1970 and April 16, 1970 agreements in issue prepared by respondent's New York matrimonial firm.*

In addition to three, separate legal firms representing the respondent, an admitted intelligent businesswoman, a college graduate, an interior decorator and who is possessed of substantial income and assets, she was always accompanied by her older sister and an older, family friend, all of whom were fully aware of the pending custody proceeding and that respondent could have sought permanent custody in the New York Court on March 23, 1970. These hearings were postponed three times, at respondent's request, and the four proposed stipulation—

agreements specifically referred to the pending New York Custody proceeding.

The final stipulation and agreement executed on April 16, 1970, was prepared by respondent's New York matrimonial attorney, was read by respondent, was explained to her, each page was initialed by her, and her signature acknowledged and witnessed by her own attorney.

The Stipulation-Agreement, dated April 16, 1970, (and reproduced in the appendix insofar as pertinent herein), specifically acknowledged that:

> ". . . *each freely and voluntarily enters into this stipulation and agreement and that no fraud, duress or coercion of any kind whatever has been exercised by the other party and that no misrepresentations are or have been involved.*" (Paragraph 10—emphasis added);

specifically provided that:

> "2. MARK shall pay child support for the two infant issue at the rate of Five Hundred ($500.00) Dollars monthly, each and every month, said payments to commence within ten days from the date hereof, and monthly thereafter."

and wherein the parties and their respective attorneys specifically contracted, stipulated and agreed that:

> "4. The parties hereby agree, that so long as MARK shall comply with paragraph '2' of this stipulation and agreement, then and in that event DALE, her agents, employees or anyone else in behalf will not directly or indirectly seek or obtain any enforcement proceedings whatever in the State of California in connection with the California judgment obtained by DALE, inclusive of any and all contempt

> proceedings, arrest proceedings or the like, in effect giving MARK immuntiy from any and all service of process whatever arising out of and in connection with said California Judgment of Divorce. Said immunity shall be for a period of two (2) years of the date hereon." (Defendant's exhibit L introduced below)

Apropos of the foregoing, it was virtually conceded below that the respondent was well aware of the pending custody proceeding involving the parties' infant child; that she was at all times represented by separate, independent counsel, in this case three separate firms of attorneys; that in behalf of respondent the custody proceedings were adjourned on three separate occasions and that at all times respondent had "two chances . . . alternatives" to entering into the stipulation-agreement dated April 16, 1970. Admittedly respondent (plaintiff below) relative to the stipulation-agreement dated April 16, 1970 was forced to concede that "there was no contact" . . . "no threats" . . . "no conversations" with petitioner or his attorney, "no insults', "no conversations" in whole or part and, moreover, at no time was respondent advised that the stipulation-agreement was "illegal", the result of undue influence or the result of fraud.

Consonant with the stipulation-agreement dated April 16, 1970, petitioner religiously and continuously complied with each and every provision and respondent *readily accepted support checks pursuant thereto for a period then in excess of three years.* Further consonant thereto, in accordance with the said stipulation-agreement, petitioner caused the New York custody proceedings to be withdrawn.

Subsequent thereto, respondent's New York attorneys further acknowledged the provisions of the stipulation-agreement, via their letter dated April 23, 1970; viz. the

commencement of two separate actions in the United States District Court for the Southern District of New York; and via respondent's California attorneys' declarations and concession on these actions that respondent "*had to file suit in New York and must do so no later than April 14, 1972*". (Emphasis added). Moreover, respondent had even thereafter requested similar immunity from service of process for herself while she was in New York.

B. The Proceedings and Trial Below

On July 20, 1970, while visiting his children in California pursuant to the stipulation-agreement, at a time when petitioner was fully complying with said provisions, and respondent admittedly accepting its benefits, a California action was instituted by respondent wherein she additionally sought damages for an alleged intentional infliction of emotional distress, conversion of personal property, attorney's fees and ancillary relief. A subsequent action relating to the stipulation-agreement was likewise instituted by respondent and both action consolidated and culminated in the judgment herein appealed from.

Reasons for Granting the Writ

It is respectfully submitted that the conduct, judicial atmosphere and substantive and procedural due process violations pervading throughout the entire trial below were demonstrated beyond question by Trial Term's settled determination to find in respondent's favor since it has predetermined from the outset that:

> "No Appellate Court is going to upset it because it is a factual determination." (566 of record below)

inferring, moreover, that it did not want to cut respondent "off at the pockets" (RT 560, lines 11-13). To this end

the record below is replete with persuasive and corroborative proof of Trial Term's failure to afford petitioner Full Faith and Credit; to permit petitioner a full, fair and impartial, opportunity to contest the jurisdictional issues; its refusal to afford petitioner the right to introduce pertinent evidence; and its overall failure to afford petitioner substantive and procedural due process of law. Under these circumstances, it is respectfully urged upon this Court that serious, substantial questions of law arise under the United States Constitution which require Federal determination.

ARGUMENT

POINT I

Full Faith and Credit should have been afforded to the New York Judgment of Divorce.

It is respectfully submitted that the California Trial Court erroneously refused to afford Full Faith and Credit to the *in personam* New York Judgment of Divorce. In the New York divorce action, respondent, admittedly, was properly served with process and via her requested adjournments appeared in the adjunct New York custody proceedings. *Both* parties were domiciles of New York State, the New York Judgment was *in personam* (*Milliken* v. *Meyer*, 311 U.S. 457; *Geary* v. *Geary*, 272 N.Y. 390 N.E. 2d 67; *Carnegie* v. *Carnegie*, 274 A.D. 887, 83 N.Y.S. 2d 252; *U. S.* v. *Costello*, D.C.N.Y. 1955, 222 F.2d 656 cert. denied, 76 S.Ct. 62, 350 U.S. 847, 100 L.Ed. 755; *Landsdale* v. *Landsdale*, (1956) 1 A.D. 2d 347, 150 N.Y.S. 2d 42), and accordingly, the New York judgment is entitled to Full Faith and Credit, in accordance with Article IV, Section V, of the Constitution of the United States.

POINT II

Petitioner was denied both substantive and procedural due process of law below violative of the guarantees afforded by the Constitution of the United States.

A. The Ex Parte California Judgment Antedating the New York Judgment was Jurisdictionally Void Ab Initio Since at no Time was there Proper Service of Process over the Person of the Petitioner

Petitioner vehemently denied service of process in the California divorce action in accordance with the statutory requirements of the laws of New York State. (*Schram* v. *Keane*, 279 N.Y. 227 at pages 232, 233 per Judge Lehman). Admittedly in this regard, respondent conceded below that at no time was petitioner ever served in California. Rather the purported service of process was attested to solely by the singular testimony of a paid, process server via *deposition* only, who did not appear, and whose deposition was completely confusing, contradictory and in all respects belied by his testimony and the *then* existant Section 211 of the *New York Domestic Relations Law* which specifically *prohibited the commencement of any matrimonial action by service of summons with a complaint.*

B. Respondent did not Satisfy the Requisite California Residency Requirements

When respondent abandoned her husband and "left" New York on May 26th, 1969, the parties' last marital domicile was New York. *On December 11, 1969, less than six (6) months later* (CT 1) *and clearly less than the one (1) year residence requirement* then in effect pursuant to

Civil Code Section 128 of the pertinent California statutes (now 4530, 4531 in effect as of January 1st, 1970) requiring domicile for at least one (1) year "next preceding the commencement of the action" respondent filed her action for "divorce". The judgment granted below, therefore, was without compliance with the Statute and was absolutely void.

Handy v. *Superior Court*, 185 C.A. 2d 21;
Erikersen v. *Erikersen*, 57 C.A. 2d 532;
Stanifli v. *Stanifli*, 53 C.A. 126;
Ungemach v. *Ungemach*, 61 C.A. 2d 29;
Haden v. *Haden*, 120 C.A. 2d 722;
Coleman v. *Coleman*, 23 C.A. 423;
Laudon v. *Laudon*, 46 C.A. 599;
Johnson v. *Johnson*, 245 C.A. 2d 40;
Whealton v. *Whealton*, 63 Cal. Rptr. 291.

and the burden of proof in this regard was upon respondent to satisfy such requirement (*Catsiftes* v. *Catsiftes*, 29 C.A. 2d 207).

Nor could or did the Trial Court's reference to the judgment roll cure this jurisdiction defect since not only were the "questions . . ." and "declarations . . ." unsigned (664), but the purported summons and complaint bearing a request for a "divorce", and the relief requested in the complaint ("for a divorce") was completely at variance with judgment of "dissolution of marriage" granted respondent (665, lines 3-13). There was "no satisfaction of the one-year residence requirement" (664, lines 16-26) and no "amendment(s)" (665, lines 11-17), as mandated by the then prevailing California statutes authority (Civil Code Section 128, now 4530, 4531; *In re Brown*, 90 C.A. 2d 691).

Apropos of the foregoing, respondent via her counsel below, conceded that in order for her case to have succeeded, it was incumbent upon her to establish that:

> "the parties were both at all times residents of California and never left California with any intention except to return in a reasonable period of time." (563)

The record below finds no substantial evidence evidencing this, and admittedly no participation whatever by petitioner was ever had in the California divorce action; at all times both parties were residents and domiciles of the State of New York; the State of New York was at all times the last matrimonial domicile; the New York judgment determined that the parties were resident-domiciles of that State; at no time was petitioner ever personally served with process within the State of California; *and at no time was petitioner ever served with the Summons in the California divorce action anywhere.* The money judgment, thereon, for alimony therefore was clearly violative of due process as imbedded in the United States Constitution (*Williams* v. *North Carolina,* 325 U.S. 226 (1945); *Griffin* v. *Griffin,* 327 U.S. 220 (1946)).

POINT III

Petitioner was denied substantive and procedural due process of law.

Scrutiny of the proceedings before the Trial Court demonstrated beyond question that petitioner was in all respects denied a fair, just, impartial and unbiased trial as required by law (*Gray* v. *Robinson,* 33 C.A. (2d) 177) and as guaranteed by the Constitution of the United States.

Aside from Trial Term's obvious, aforesaid pre-determination (supra at page 14), its abject over-zealousness and prejudice openly displayed towards respondent at every turn in stark distinction to petitioner, the Trial Court's improper shifting of the parties' respective burdens of proof (RT 38, lines 9-10; 40, lines 10-16; 41, lines 1-15) its determination relative to the stipulation-agreement of April 16, 1970 and its entire conduct and hostile atmosphere pervading the trial below was clearly prejudicial to petitioner, erroneous, and deprived petitioner of due process of law.

Despite the commencement of respondent's California Declaratory Judgment action (*Sausen* v. *Anderton*, 129 Cal.App.2d 320, 276 P.2d 314 (1954); *Cal. Employment Commission* v. *Malm*, 59 Cal. App. 2d 322, 138 P.2d 744 (1943); *Patrizzi Equipment Co.* v. *General Dynamics Corp.*, 219 Cal. App. 2d 106, 32 Cal. Reptr. 801 (1963); *Polk* v. *Polk*, 228 Cal. App. 2d 768, 39 Cal. Reptr. 824 (1964); *Valentine* v. *Provident Mut. Life Ins. Co. of Phil.*, 55 Cal. 2d 1243 (1936)), despite the issues of fraud, duress and undue influence specifically raised and pleaded by respondent (*Vaughn* v. *Coccimiglio*, 241 Cal. App. 2d 676, 50 Cal. Reptr. 876 (1966); *Langenbeck* v. *Louis*, 140 Cal. 406, 73 P. 1086 (1903); *Davis* v. *Hibernia Sav. & Loan*, 21 Cal. App. 444, 132 P. 462 (1913); *Hamilton* v. *Abadjian*, 30 Cal. 2d 49, 179 P.2d 804 (1947); *Roadside Rest* v. *Lankershim Estate*, 76 Cal. App. 2d 525, 173 P.2d 554 (1946)) and, admittedly, the Trial Court's expressed doubt;

> "that I am not sure that I was correct in putting the burden of proof on the defendant as to the validity of this agreement." (RT 557, lines 13-15),

petitioner was seriously prejudiced (a presumption even if not "shown" which will be presumed, West's *California*

Digest, Appeal, page 252), and denied due process of law by virtue of the shifting of the burden of proof which was strenuously objected to by petitioner below.

Further compounding the effective denial of due process below was Trial Term's "*modus oprendi*" relative to the stipulation-agreement of April 16th, 1970 both in its aplication of burden of proof and choice of laws.

In this regard it is respectfully submitted that the holding of the California Supreme Court in adhering to the determination of the Superior Court of its State applying solely the purported laws of California, runs squarely contrary to the holding of this Court in *Pritchard* v. *Norton*, 106 U.S. 124 (1882) wherein Mr. Justice Matthews in reversing and directing the granting of a new trial, aptly noted:

> "The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in Wayman v. Southard, 10 Wheat. 1, 48, where he defined it as a principle of universal law,—'The principle that in every forum a contract is governed by the law with a view to which it was made.' . . .
>
> So, Phillmore says: . . .
>
> 'As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted, either by an express declaration to the contrary, or by the fact that the obligation is il-

legal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements.' 4 Int. Law, sect. DCLIV, pp. 470, 371.

This rule, if universally applicable, which perhaps it is not, . . . would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld.

At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent . . .

* * *

If now we examine the terms of the bond of indemnity, and the situation and relation of the parties, we shall find conclusive corroboration of the presumption, that the obligation was entered into in view of the laws of Louisiana.

* * *

"We do not hesitate, therefore, to decide that the bond of indemnity sued on was entered into with a view to the law of Louisiana as the place for the fulfillment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration, should be determined by the law of Louisiana, and not that of New York. For error in its rulings on this point, consequently, the judgment of the Circuit Court is reversed, with directions to grant a new trial."

Likewise in *New York Life Insurance Co.* v. *Dodge*, 246 U.S. 357 (1918) and as reaffirmed by Mr. Justice Holmes in *Mutual Life Insurance Co.* v. *Liebing*, 259 U.S. 209 (1922):

> "In whichever way regarded, the facts lead to the same conclusion; and although the circumstances may present some temptation to seek a different one by ingenuity, the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act."

Clearly, the general rule is that the validity of a contract is to be determined by the law of the state in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state whose laws do not permit such a contract. *Scudder* v. *Union National Bank*, 91 U.S. 406.

Apropos of the aforesaid, as astutely observed in a review by Rheinstein of Falconbridge, Essays on the Conflict of Laws (1947), in 15 U. of Chi.L.Rev. 478, 485-487 (1948):

> ". . . there cannot be found any reason why a state, through its legislature or its courts, should not lay down the following rule: Whenever parties to a situation which is alleged by one to have given rise to a legally enforceable contract, have in some ascertainable way expressed the opinion that disputes which may later arise out of that relation shall be decided under the legal system of some particular state or country, such law shall be resorted to whenever such a dispute actually arises . . . If a state adopts that rule, then the law thus determined by the parties is the proper law of the con-

tract and it is inconsistent to say that, by their understanding, they cannot exempt their contract from the prohibitive or restrictive provisions of the proper law. The law to whose prohibitive, restrictive, and other provisions the alleged contract is subject is the law referred to by the parties, just because it is the proper law and it is the proper law simply because the choice of law rule of the forum declares it to be such.

. . . If we agree that it is one of the very basic policies of the conflict of laws to prevent the application of a legal system of which the parties could not have thought, or, to express the same idea in a positive way, if we regard it as one of the principal purposes of the conflict of laws to protect the justified expectations of the parties, then the intention of the parties rule is the one which fulfills that purpose better than any rival rule . . .

• • •

. . . There also remains the practical difficulty with which the court may be faced when it is asked to ascertain and interpret some foreign, conceivably exotic, law. This effort should not be asked of the court unless there are some good, objective reasons. It ought to be considered, however, that . . . [if] parties to a transaction stipulate some law other than that of their respective places of business or domicile, they will hardly do so without cause . . ."

Under the applicable choice of law of New York, the stipulation-agreement was valid and enforceable (*Hall* v. *Osell*, 102 Cal. App. 2d 849, 228 P.2d 923 (1951); *Falnery* v. *Koch*, 103 Cal. App. 2d 55, 228 P. 2d 580 (1951); *Elliott* v. *Market Street Ry. Co.*, 4 Cal. App. 2d 292, 40

P.2d 547 (1935); *Cucuk* v. *Payne*, 140 Cal. App. 2d 881, 296 P.2d 7 (1956); *Austin* v. *Newton*, 46 Cal. App. 493, 189 P.471 (1920); *S.A. Strauss Co., Inc.* v. *Canadian Pacific Ry.*, 254 N.Y. 407, 173 N.E. 564; *Michelin Tire Co.* v. *Coleman, etc. Co.*, 93 Cal. App. 2d 698; *Commercial Cas. Ins. Co.* v. *Ind. Acc. Comm.*, 110 Cal. App. 2d 83; *Whitney, Law of Contracts*, Page 174, 67 Corpus Jur. 265; *Louis de Roll Iron Works, Ltd.* v. *Webb & Knapp, Inc. et al.*, 36 Mis. 2d 216; *Linker* v. *Hernard*, 13 Mis. 2d 445; *Roe* v. *Smyth*, 252 App. Div. 609 (N.Y.); *International Publications* v. *Malchabelli*, 230 N.Y. 451, 184 N.E. 51; *Schwartz* v. *Zim Israel Navigation Company*, 181 N.Y. Supp. 2d 283; *Rentways Inc.* v. *O'Neil Milk and Cream Co.*, 308 N.Y. 342, 126 N.E. 2d 271; *Taylor* v. *U.S. Cas. Co.*, 269 N.Y. 360; *Evelyn Bldg. Corp.* v. *City of N.Y.*, 257 N.Y. 501, 178 N.E. 771; *Sovero Bros. Contracting Corp.* v. *City of New York*, 161 N.Y.S. (2d) 88, 2 N.Y. (2d) 924; See *Brown* v. *Brown*, 104 C.A. 2d 88; *J. R. Const. Corp.* v. *Berkely Apartments*, 19 N.Y.S. 2d 500, 259 A.D. 830; *McGill* v. *McGill*, 179 A.D. 343, aff'd. 226 N.Y. 673, 123 N.E. 877; *Housing* v. *Dairymen's League Co-Op Ass'n.*, 16 N.Y.S. 2d 137, 258 A.D. 890; *Nixon* v. *Leitman*, 224 N.Y.S.2d 448; *McPherson* v. *Cox*, 86 N.Y. 472; *Petcheff* v. *Christo Petcheff*, S.A. 286 A.D. 1099, 145 N.Y.S. 2d 694 (129 N.Y.S. 206); *Papert* v. *Conway*, 279 A.D. 895, 111 N.Y.S. 2d 605 (107 N.Y.S. 2d 638); *Martin* v. *New Rochelle Water Co.*, 11 A.D. 177, Affd. 162 N.Y. 599.)

Permeating throughout the trial record below were glaring examples of due process denials. At all stages of the proceeding, Trial Term unnecessarily, improperly and erroneously hampered and frustrated petitioner's cause in not permitting inquiry into respondent's finances (151, 152); in refusing to admit certain "exhibits" into evi-

dence (Exhibit P, a letter dated April 9, 1970), attached to one of the proposed agreements (RT 83, lines 17-28; 85, lines 1-28; 86, lines 1-5), which was clearly referable to the negotiations between the parties leading up to the final agreement of April 16, 1970 and further evidencing the arms length negotiations between the parties; in refusing, as aforesaid, to admit into evidence Exhibit T (for identification) the immunity telegram dated March 31, 1971, from respondent to petitioner (RT 107, lines 16-28; 108, lines 1-27); in striking certain testimony of the petitioner; in refusing to admit other testimony; in sustaining objections to certain testimony with respect to petitioner's visitation denials (RT 206, lines 5-28; 207, lines 1-26) with respect to rampant, hearsay testimony (RT 344, lines 18-28; 345, lines 1-9; 346, lines 12-28; 347, lines 1-8; 350, lines 1-8) and, for example, in refusing to consider certain New York depositions (RT 720, line 28; 721, lines 1-2; 807, lines 5-28; 808, lines 1-2) *despite the Court's assurances and representations to do so* (RT 808, lines 26-28; 973, lines 23-26).

In stark contrast, however, the Trial Judge was improperly over solicitous in respondent's behalf (247, lines 21-22) to the degradation and denial of due process to respondent, and at all stages of the proceedings in further, completely prejudicing petitioner's cause, never ceasing in its efforts "to help the plaintiff" (1199). Thus, while never refusing respondent or her counsel with "as much time as needed" (1100) for its case, this courtesy was, however, never extended to petitioner (653, 702) even on the most vital phase of his case. In fact, the court would and did not hesitate at every turn to help respondent even in her questioning (674); "assisting" respondent's counsel in presenting proper cross-examination by petitioner, the court noting that:

> "I will do it when it seems to further our cause here. The entire conversation can be had without hurting the case at all. He has given it twice now, but you can ask him specifically if you like." (281)

On occasions, moreover, when respondent was obviously floundering in her testimony the Trial Court would and did not hesitate to provide answers. Indeed, even when confronted with her obvious prior, false statements under oath (RT 155 to 156), the Court painstakingly (and it is respectfully submitted improperly) sought to extricate respondent from her uncomfortable posture (RT 156, lines 7-15).

Trial Term's prejudice and due process denials became even more apparent during the testimony of one Mitchell Frankel, respondent's own witness. Thus, while on the stand and in the middle of examination by respondent's counsel, the Trial Court incredulously suggested that the witness and respondent's counsel should consult with one another, with the following colloquy occuring:

> "Mr. Erdheim: Move to strike the witness's statement. I believe he said, 'I think,' and I believe also, Judge, there is no time and no place.
>
> The Court: Yes. The answer is stricken.
>
> Let's lay a foundation so I am not continually having to rule on perfectly good objections.
>
> Do you want to consult with this witness and find out just how much you can develop on his memory or if that would hasten—
>
> Mr. Fink: Your Honor, obviously he isn't a professional witness.
>
> The Court: I don't say that we should have professional witnesses. I think that I have kept you so busy this morning in the work that I di-

> rected to be done, you didn't have a chance to talk to him—and I use the term with an entire propriety 'prepare' him for the stand. That is not to say you tell him what to do, but I don't think you and the witness talked about what episode you are going to develop.
>
> I am wasting my time. We have been here 40 minutes and haven't got a teaspoon of information."

Further illuminating on the Lower Court's substantial impairment of petitioner's right to fully litigate the issues, his right to introduce evidence unimpaired (RT 789, lines 27-28; 790, lines 1-18; 517, lines 19-25; 513, line 28; 520, lines 4-28; 521, line 1) and its denials of due process was its chameleon-like position relative to the parties' respective burdens of proof (38, 41; 636, lines 20-23).

Mindful of *Sherrer* v. *Sherrer*, 334 U.S. 343 (1948), in all respects the proceedings in the California Court "prior to the entry" of the judgment, were completely inconsistent with the requirements of procedural due process. "His rights to introduce evidence and otherwise to conduct his defense were" completely impaired and in no manner was he in fact "afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of . . . (respondent's) domicile."

CONCLUSION

On the substantive and procedural questions herein involved, which raise an appeal to the full faith and credit clause and the due process clause of the Constitution of the United States, this petition should be granted.

Respectfully submitted,

MICHAEL F. ERDHEIM
Attorney for Petitioner

APPENDIX

Chronological Summary

March 4, 1962	Date of parties' marriage
late 1962-May, 1969	Respondent and Petitioner continuously and permanently reside in New York except for plaintiff's visits with parents in California
	All incidents of domicile in New York State
Prior to November, 1968	Parties attempt to locate Westchester County, New York State home
November, 1968	Parties contract for purchase of Scarsdale, New York home
February 10, 1969	Parties and two children move into Scarsdale, New York home
May, 1969	Petitioner's financial difficulty
May 26, 1969	Respondent's unilateral abandonment of Petitioner—Respondent denies defendant visitation or contact with children
July, 1969	New York action commenced
December 11, 1969	Respondent's California action purportedly commenced
February 17, 1970	New York Judgment of Divorce
March 4, 1970	New York custody order and hearing set for March 23, 1970
March 12, 1970	Interlocutory decree of divorce in California (entered *nunc pro tunc* as of February 27, 1970) granted

Chronological Summary

April 16, 1970	Stipulation-Agreement executed by the parties in New York
July 20, 1970	California declaratory judgment action and ancillary relief—Second California action to declare stipulation-agreement dated April 16, 1970, invalid
October 1, 1973	Opinion and judgment of Supreme Court of California, Los Angeles County
June 27, 1975	Opinion of Court of Appeals of the State of California
August 20, 1975	Order of Supreme Court of the State of California denying hearing

Opinion and Judgment of the Supreme Court of California, Los Angeles County

(Filed—October 1, 1973)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. 982 310
No. 990 861
(Consolidated)

DALE ROSENSTOCK,

Plaintiff,

vs.

MARK E. ROSENSTOCK,

Defendant.

MARK E. ROSENSTOCK,

Cross-Complainant,

vs.

DALE ROSENSTOCK,

Cross-Defendant.

JUDGMENT

The above entitled causes having come on for consolidated trial on August 1, 1973, in Department 15 of the

above entitled court, the Honorable Stevens Fargo, Judge presiding; the Law Offices of Max Fink, by Max Fink and R. Stephen Duke, appeared as counsel for plaintiff and cross-defendant Dale Rosenstock, and Michael F. Erdheim, Pro Haec Vice, and Vivian Paul appeared as counsel for defendant and cross-complainant Mark E. Rosenstock and the trial having been concluded on August 15, 1973, and the Court having heard and considered the evidence, both oral and documentary offered by the respective parties, the Court being fully advised in the premises, having made its Findings of Fact and Conclusions of Law herein and in accordance therewith.

IT IS ORDERED, ADJUDGED AND DECREED:

1. The California Decree of Dissolution of Marriage granted and entered by the Los Angeles Superior Court in action D 759 139 is a valid final decree in all particulars, personally binding the defendant to pay plaintiff spousal support, child support, attorney fees and costs as provided therein.

2. Defendant shall pay to plaintiff the sum of $5,000.00 in general damages as and for his wrongful conversion of plaintiff's property.

3. Defendant shall pay to plaintiff the sum of $20,000.00 in general damages and $10,000.00 in punitive damages as and for his intentional and malicious infliction of severe emotional and mental distress and suffering upon the person of plaintiff by his unlawful act of abducting, concealing and detaining the minor child, Robert David Rosenstock.

4. Defendant shall pay to plaintiff the sum of $100,000.00 as and for the attorney fees reasonably and necessarily incurred by plaintiff for maintenance of these actions to enforce the California decree of dissolution and to determine its validity.

5. Defendant shall pay to plaintiff the sum of $35,000.00 as and for the costs reasonably and necessarily incurred by plaintiff in hiring accountants and for travel expenses.

6. The New York Stipulation and Agreement dated April 16, 1970, is void, illegal and unenforceable as being procured by defendant's duress and undue influence.

7. Defendant and cross-complainant shall take nothing under his cross-complaints in actions 982 310 and 990 861.

8. Plaintiff shall recover against defendant her costs of suit in actions 982 310 and 990 861 in the amount of $5,007.50.

9. This Judgment shall bear interest at the legal rate from the date of entry.

Done in Open Court this 1st day of October, 1973.

STEVENS FARGO
Stevens Fargo
Judge of the Superior Court

Opinion of the Court of Appeals of the State of California

(Filed—June 27, 1975)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Civil No. 44414
(Sup. Ct. Cons. Nos.
D759139, 982310 c/w
990861)

In re the marriage of

DALE ROSENSTOCK,

Petitioner, Cross-Defendant, and Respondent,

v.

MARK E. ROSENSTOCK, JR.,

Respondent, Cross-Complainant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Stevens Fargo, Judge. Affirmed with directions.

Opinion of the Court of Appeals of the State of California

Bodle, Fogel, Julber, Reinhardt and Rothschild, Daniel Fogel, Joel N. Klevens, and Vivian Paul for Appellant.

Max Fink and R. Stephen Duke for Respondent.

This is an appeal from a judgment declaring that a prior judgment of dissolution of marriage obtained by respondent (Wife) upon the default of appellant (Husband) is valid, awarding damages for amounts accrued under the earlier judgment, damages for intentional infliction of emotional distress, damages for conversion, and attorneys' fees and expenses. Husband contends: (1) the court lacked personal jurisdiction over Husband so that the default judgment of dissolution of marriage is void; (2) that judgment is void because Wife failed to satisfy the California residence requirements then existing as a condition to divorce; (3) an agreement and stipulation of Husband and Wife bars the action at bench; (4) the court was without power to award Wife attorneys' fees and the fees awarded are excessive; and (5) the portion of the judgment awarding Wife damages for Husband's intentional infliction of emotional distress is not supported by substantial evidence. Concluding that appellant-Husband's contentions in essence do no more than seek a redetermination of factual issues decided adversely to him on conflicting but substantial evidence, we affirm the judgment. We remand the matter to the trial court so that it may determine the amount of additional attorneys' fees to which respondent-Wife may be entitled for services with respect to this appeal.

We recite the evidence in the light most favorable to the findings of fact of the trial court, resolving all con-

flicts as did that court and accepting all inferences from the testimony reasonably drawn in support of the findings. (*Crawford* v. *Southern Pac. Co.*, 3 Cal.2d 427, 429 [45 P.2d 183]; 6 Witkin, Cal. Procedure (2d ed.), Appeal, § 245.)

Husband and Wife were married in Beverly Hills, California, on March 4, 1962. Immediately after their marriage, they resided in New Jersey. In October 1963, they moved to an apartment in New York City. Husband's principal business was Dale Oldsmobile, an automobile sales business of which he was the majority owner. In 1965, Husband told a business acquaintance that he intended to move to California. He had arranged the management of Dale Oldsmobile so that he was not needed on a day to day basis. In the early summer of 1966, Husband, Wife, and their two children moved to California, residing in the Coldwater Canyon area of Los Angeles. Late in 1967, they moved to a house at 1699 Carla Ridge in Beverly Hills which they leased with an option to purchase. Husband referred to the Carla Ridge address as his residence and said to associates he intended to open a business headquarters in Los Angeles.

Husband travelled frequently to New York, using the Carla Ridge address as his residence when he registered at the Sherry Netherlands Hotel. His bank account at Citizen's Bank carried the same residence address as did his brokerage account with Shearson Hammill & Co. Inc. Husband and Wife had registered to vote in New York and did not reregister in California. Wife signed federal and local tax returns prepared under Husband's direction showing New York as their residence through 1968.

Husband stayed at hotels or at his sister's apartment when he was in New York City. Wife and children stayed with Husband at hotels on occasions when they accompanied him. Until 1969, Husband and Wife maintained the Carla Ridge property as their marital headquarters. Their furniture, clothing, and personal effects were kept there. The two children of the marriage attended school in Beverly Hills.

In 1968, marital discord developed. Husband inflicted physical cruelty upon Wife. In 1969, Husband, Wife, and the children went to New York where they occupied a house purchased by Husband in Scarsdale. When interviewing a housekeeper, Husband told her that the stay in New York would be temporary. Husband's purpose in New York was to acquire a business for himself and California associates. He told a prospective employee the business would be operated from California. The marital discord again erupted with Husband beating Wife. Wife returned to California with the two children. On December 11, 1969, she filed her complaint for divorce in the Los Angeles Superior Court.[1] Husband was served by mail and personally in New York. He did not appear in the California action and his default was entered. The matter was set for hearing on March 10, 1970.

On March 3, 1970, Husband and a private investigator hired by him went to the Hawthorne School in Beverly Hills which 5-year-old Bobby, the son of the parties, attended. Using the pretext that Bobby's grandfather was in an automobile parked next to the school ground, Husband took Bobby from the school. He took the boy by

[1] The complaint predated the Family Law Act.

chartered airplane to Las Vegas where they boarded a scheduled airliner to New York. Early the next morning, Husband proceeded with Bobby to the Westchester, New York, courthouse where he met an attorney. Represented by the lawyer, Husband obtained a temporary custody order from the New York court.

Wife obtained an ex parte order advancing the hearing upon her California divorce action to March 5, 1970. An interlocutory judgment of dissolution was entered on March 12, 1970, *nunc pro tunc* as of February 27, 1970, awarding Wife custody of the two children with reasonable visitation rights to Husband. The judgment awards $500 per month child support and $2,500 per month spousal support. It does not divide community property.

Wife frantically sought the whereabouts of Bobby. She telephoned Husband in New York. He told her she would never get the boy back and refused to disclose Bobby's whereabouts. Through her California counsel, Wife retained a New York law firm to find Bobby. Contacted by Wife's New York counsel, Husband's New York attorney refused to disclose the whereabouts of the boy, but said "things could be worked out," in terms Wife's counsel viewed as extortionate and so informed Husband's New York lawyer. Wife's New York counsel hired private investigators to locate Bobby to no avail.

After a few days, Wife travelled to New York. She was very upset. Told by her attorneys that Bobby could not be located, she insisted that she wanted him at all costs. Her New York lawyers informed her that they could not guarantee Husband's compliance with any New York court order re custody if one should be entered.

A stipulation and agreement was drafted acknowledging the New York order for temporary custody and stipulating that Wife should have custody of the two children of the marriage with reasonable visitation rights to Husband. Husband agreed to pay child support of $500 per month but no spousal support. Wife agreed not to undertake proceedings in California to enforce her California judgment of divorce and to give Husband immunity from California process. Wife and Husband agreed not to pursue criminal proceedings against the other. Wife and her counsel executed the agreement and stipulation on April 16, 1970, because there was no other practical alternative if Wife was ever to see Bobby. After reneging upon his agreement to produce Bobby at the time Wife signed the agreement and stipulation, Husband eventually turned him over to Wife. She returned to California and, on July 8, 1970, obtained a final judgment of dissolution of marriage in terms essentially those of the interlocutory decree.

Husband failed to comply with the terms of the California judgment. Appellant, on July 20, 1970, filed the first of the two consolidated actions which commenced the case at bench.

Husband's attack upon the California judgment, for lack of jurisdiction over him and lack of residence by Wife for the statutory period, essentially raises only the sufficiency of evidence to support the trial court's factual findings of fact giving it jurisdiction and determining Wife's residence in California for the requisite period prior to the filing of her complaint. Our sole function with respect to that issue is the determination of the presence or absence in the record of substantial evi-

dence to support the critical findings. If that substantial evidence is present, the trial court must be upheld. (*Overton* v. *Vita-Food Corp.*, 94 Cal.App.2d 367, 370 [210 P.2d 757].)

Here the record contains substantial evidence supporting the findings of jurisdictional fact of the trial court. As the statutory law existed at the time that the action at bench was commenced and served by substituted out-of-state service upon Husband, personal jurisdiction over an out-of-state defendant was present when he had been a resident of California at the time the cause of action arose. (Former Code Civ. Proc., § 417 (repealed 1969).)[2] Here the cause of action arose out of Husband's acts of cruelty while he and Wife were residents of and domiciled in California. Domicile involves the concurrence of physical presence in a particular place with the intention to make that place one's home. (*Smith* v. *Smith*, 45 Cal.2d 235, 239 [288 P.2d 497].) Residence "is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose." (Gov. Code, § 244, subd. (a).) The home at Carla Ridge was the place where Husband and Wife were present with intention to make it their home and the place where they remained when not called elsewhere temporarily. The conduct of the par-

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[2] The statutory test of jurisdiction satisfies the constitutional minimum contacts test where the cause arises out of defendant's acts within California. (*Owens* v. *Superior Court*, 52 Cal.2d 822, 829-830 [345 P.2d 921]; see Gorfinkel and Lavine, *Long Arm Jurisdiction in California*, 21 Hastings L.J. 1163.) Husband does not complain of lack of notice or of any departure from the statutory requirement of substituted service.

ties, Wife's testimony, and Husband's own statements, all support the trial court's finding to that effect. While Husband and Wife were absent from California for about three months at the beginning of the year 1969, there is credible testimony that they intended the absence to be temporary and to return to California. Husband's arguments to the contrary focus on testimony that the trial court was empowered to disbelieve, or from which it was entitled to draw inferences either favorable or unfavorable to Husband. Since we are without power to reweigh matters of credibility or to ignore permissible inferences drawn by the trial court, the argument must be rejected.

The same analysis supports the trial court's finding that Wife was a resident of California from June of 1966 thus satisfying the then residency requirement for divorce.

Husband's contention that the New York agreement and stipulation fixes the rights of the parties so as to bar the action at bench mounts a similar attack upon findings of fact of the trial court. Those findings determine the agreement to be voidable by Wife because it was procured by Husband's duress and undue influence. Again, the critical findings are supported by substantial evidence.

An "apparent consent to a contract is not real" and the contract is therefore voidable where the consent is obtained by duress or undue influence. (Civ. Code, § 1567.) "Duress [includes]: confinement of [the child of a party], lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive." (City Code, § 1569, subd. 3.) "Undue influence [includes] taking a grossly oppressive and unfair advantage of another's ne-

cessities or distress." (Civ. Code, § 1575.) Here there is credible evidence accepted by the trial court that Husband obtained possession of Bobby by taking him from the Hawthorne School grounds on a fraudulent pretext, removed the child surreptitiously to Las Vegas and then to New York, refused to disclose his whereabouts to Wife, and used the threat that Wife would never see her child again to extort the agreement of Wife and her counsel to the stipulation and agreement. That conduct constituted confinement of a child of a party "fraudulently made unjustly harrassing [and] oppressive." It also represented action by Husband taking a "grossly oppressive and unfair advantage of" Wife's necessity and distress.

Husband's contention that the court was without power to award attorneys' fees misstates the record. He apparently accepts the controlling principle that temporary support and expenses of litigation may be awarded in a proceeding by a former spouse "to have a decree interpreted, modified, or enforced" or to vacate the former decree. (*See* v. *Superior Court,* 55 Cal.2d 279, 280-281 [10 Cal.Rptr. 634, 359 P.2d 32]; see also new Civ. Code, § 4370, subd. (a).) He argues, however, that the proceeding at bench is not within the rule. The argument is frivolous. Wife's complaint sought a declaration interpreting the decree as valid and seeking its enforcement. Husband's counter pleadings sought to have the decree vacated as one entered without jurisdiction.

Husband's contention that the attorneys' fees and expenses awarded by the trial court are excessive repeats his running battle with findings of fact of the trial court supported by substantial evidence. The trial court explicitly awarded fees and expenses only for services re-

lated to the interpretation and enforcement of the dissolution decree, excluding from its consideration services and expenses related to other causes of action pursued by Wife. Having done so, it awarded Wife $100,000 in attorneys' fees and $35,000 in expenses primarily related to accounting services. The record contains testimony establishing a vast amount of time expended on the case by Wife's attorney related to the validity and enforcement of the judgment necessitated by the obdurate conduct of Husband and his New York counsel. Wife's counsel spent 50 days in taking depostitions in New York. The clerk's transcript is almost 2,000 pages long, most of it pertaining to discovery that would have been unnecessary had counsel been cooperative. It is apparent from the record that Husband had embarked upon a course of conduct before and during the litigation to make life miserable for Wife. Having elected the pleasure of that floor show, he cannot avoid the cover charge.

Husband's appellate counsel argues that there is a lack of competent evidence to support the trial court's determination because Wife's trial counsel testified to the amount of time spent by him and the nature of his services without being sworn. The contention is frivolous, the requirement of an oath having been waived by stipulation.

Husband returns to his war upon the findings in his final contention, arguing that substantial evidence does not support the findings of the trial court necessary to its award of damages to Wife for infliction of emotional distress by Husband. Again the contention lacks merit.

General and punitive damages are recoverable for the intentional infliction of emotional distress. (*Fletcher* v.

Western National Life Ins. Co., 10 Cal.App.3d 376 [89 Cal. Rptr. 781].) The elements of the tort are: (1) outrageous conduct; (2) intention to cause emotional distress or a reckless disregard of the probability that the conduct will cause it; (3) severe emotional distress suffered by the plaintiff; and (4) proximate cause. (*Fletcher* v. *Western National Life Ins. Co.*, *supra*, at p. 394.) Here the outrageous conduct of Husband appears in his conduct in taking Bobby and refusing to tell Wife of Bobby's whereabouts. (See *Fletcher* v. *Western National Life Ins. Co.*, *supra*, at pp. 397-398, conduct to extort settlement of a dispute is "outrageous.") Husband's intention to inflict emotional distress upon Wife can be inferred from his conduct toward her. Testimony establishes that Wife, in fact, suffered severe emotional trauma caused by Husband's conduct.

The judgment is affirmed. The matter is remanded to the trial court for determination of the amount of attorneys' fees and expenses to be allowed Respondent for services in this appeal. Respondent (Wife) to recover costs on appeal.

Not for Publication.

THOMPSON, J.

We concur:

LILLIE, Acting P. J.
HANSON, J.

Order of Supreme Court of the State of California Denying Rehearing

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

Aug 20 1975

I have this day filed Order Hearing Denied

In re: 2 Civ. No. 44414

Rosenstock

vs.

Rosenstock, Jr.

Respectfully,

G. E. BISHEL,
Clerk

Stipulation and Agreement Executed by the Parties in New York

WHEREAS, the parties hereto, Dale Rosenstock, hereinafter referred to as "Dale" or the "Mother" and Mark E. Rosenstock, hereinafter referred to as "Mark" or the "Father" are desirous of entering into a stipulation of, and concerning the custody and visitation of Robert David Rosenstock, hereinafter referred to as "Robert" and Dana Lynn Rosenstock, hereinafter referred to as "Dana", the infant issue of the parties and

WHEREAS, Mark has heretofore been awarded temporary custody of Robert in the Supreme Court of the State of New York County of Westchester on March 4th, 1970 pending the hearing and determination of an application made by Mark for the custody of Robert and Dana, and Dale has heretofore been awarded custody of Robert and Dana in the Superior Court of the State of California, County of Los Angeles, on March 12th, 1970, enter therein nunc pro tunc as of February 27th, 1970; and

WHEREAS, both parties heretofore have been awarded a judgment of divorce in his and her favor as against each other,

NOW, THEREFORE, it is hereby stipulated and agreed to and by and between the parties hereto as follows:

1. Dale shall have the custody, care and control of Robert and Dana and said custody, care and control of said children by Dale is hereby consented to in all respects by Mark. Simultaneously with the execution and delivery of this agreement, Robert shall be delivered by Mark to Dale or to Mitchell Salem Fisher, Esq., her attorney, at his office, 122 East 42nd Street, New York City or his home, 1050 Park Avenue, New York City. Mark consents

that said child may be returned to the Mother and to the residence of the Mother in Beverly Hills, California and shall not impede or delay such return.

2. Mark shall pay child support for the two infant issue at the rate of Five Hundred ($500.00) Dollars monthly, each and every month, said payments to commence within ten days from the date hereof, and monthly thereafter.

3. Mark shall have and enjoy compete and reasonable telephonic communication and rights of visitation in Beverly Hills, California (or such other place where the children may be residing with the Mother), at any and all times that Mark shall be able to visit them at such place of residence, including but not limited to Christmas and Easter school recess, Spring intercession, birthdays and important holidays and occasions, except and provided (a) that Mark unless prevented by emergency arrangements shall give at least two weeks written notice of his intention to exercise such right of visitation, (b) each such exercise of visitation shall be consonant with the education, welfare and program of the children and (c) the Christmas, Easter and Spring intercession recess shall be reasonably shared by the parties. Additionally Mark shall have the right to have both of the aforesaid infant children for a three week period during the Summer months. Mark shall give a written notice to Dale no later than May first of each year as to the particular three week period of visitation desired by him. If, however, said infant children or child

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shall attend Summer camp, then in that event, Mark's right of visitation with said child or children shall be limited to a period of one week before and one week after said Summer camp. Mark shall promptly notify Dale of his exercise of the aforegoing rights of visitation, which may be exercised by Mark outside of the State of California, further provided however that Mark shall safely return said infant child or children to Dale upon completion of said visitation. Time shall be deemed of the essence with respect to such return. The expenses of transportation of the children from and to their residence with the Mother and the expenses of the children with the Father during and visitation by him shall be borne by the Father.

4. The parties hereby agree that so long as Mark shall comply with paragraph "2" of this stipulation and agreement, then in that event Dale, or her agents, employee or anyone else in her behalf will not directly or indirectly seek or obtain any enforcement proceedings whatever in the State of California in connection with the California judgment obtained by Dale, inclusive of any and all contempt proceeding, arrest proceeding or the like, in effect giving Mark immunity from any and all service of process whatever arising out of and in connection with said California Judgment of Divorce. Said immunity shall be for a period of two (2) years from the date hereof.

5. The parties agree that Mark does not by this stipulation submit to the jurisdiction of the State of California and that Dale does not by this stipulation submit to the jurisdiction of the State of

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New York and that the same shall not constitute a conferral or waiver of jurisdiction over the person or subject matter of either of the parties.

6. The parties hereby agree that no criminal proceedings shall be brought by or instituted on behalf of the other by reason of the past conduct of the other party.

7. The parties agree that the payment of child support of $500.00 monthly shall not constitute an admission or inference by Mark as to the claimed validity of the California Judgment of Divorce. Said payments are without prejudice and may not be referred to in any proceedings or action by Dale except to enforce this stipulation and agreement.

8. The parties hereby agree that any and all actions, proceedings whatever, whether in law or equity with respect to the validity of the California Judgment of Divorce must be commenced by Dale within the two year period specified in paragraph 4 hereof, or shall thereinafter be forever barred and prohibited in so far as relating to and pertaining to her rights only and not that of the infant children. In the event Dale shall nevertheless commence any action or proceeding anywhere subsequent to this two year period of limitations, then in that event, this stipulation may be referred to and shall constitute a bar to such action or proceedings. In the event that such action or proceeding shall be commenced by Dale within said two year period, but shall not result in any order or decision with respect thereto, the parties agree that Mark's immunity and visitation rights herein shall

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be accordingly extended until said order, judgment or decision.

9. The parties hereby agree that in the event of a breach of this stipulation by either party that party so causing said breach shall be liable for and shall pay for the other party's costs, including reasonable counsel fees and transportation costs.

10. The parties hereto acknowledge that each freely and voluntarily enters into this stipulation and agreement and that no fraud, duress or coercion of any kind whatever has been exercised by the other party and that no misrepresentations are or have been involved.

11. No modification or waiver of this stipulation and agreement shall be valid unless in writing signed by the parties.

Dated: April 16, 1970.

DALE ROSENSTOCK
Dale Rosenstock

Witness as to the Mother:

(Illegible)
Attorney for Dale Rosenstock

MARK E. ROSENSTOCK
Mark Rosenstock

Witness as to the Father:

(Illegible)
Attorney for Mark Rosenstock

Stipulation and Agreement Executed by the Parties in New York

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this 16th day of April, 1970, before me personally appeared Dale Rosenstock to me known and known to me to be the individual described in and who executed the foregoing instrument and she duly acknowledged to me that she executed the same.

MICHAEL F. ERDHEIM
(Notorial Seal Illegible)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this 16th day of April, 1970, before me personally appeared Mark Rosenstock to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

MICHAEL F. ERDHEIM
(Notorial Seal Illegible)